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No. 84-1666

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ERNEST R. CUMMINGS,
Petitioner,

vs.

UNITED STATES OF AMERICA, and
UNITED STATES POSTAL SERVICE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GABRIELLE GULYASSY KINKELA
(Counsel of Record)
VICTOR J. GULYASSY
ROBERT V. KINKELA
GULYASSY, KINKELA & KINKELA
6461 Pearl Road, Suite One
Parma Heights, Ohio 44130
216-842-1313
Counsel for Petitioner,
Ernest R. Cummings

10410

QUESTIONS PRESENTED

1. Where petitioner's claim for lunch period compensation has been brought under the Fair Labor Standards Act, did the Sixth Circuit err by failing to decide the claim in compliance with this Court's construction of the Act?

2. Where Postal Service employees have been specifically included as employees within the meaning of the Fair Labor Standards Act, and where they have been just as specifically excluded from the Federal Employees Pay Act, did the Sixth Circuit frustrate Congressional intent by denying petitioner's claim in reliance on the inapplicable Federal Employees Pay Act?

3. Did the Sixth Circuit err by depriving a Postal Service employee of the same application of the Fair Labor Standards Act afforded employees in the private sector?

PARTIES TO THE PROCEEDING

The petitioners are letter carriers, presently or formerly employed by the United States Postal Service. This action was brought under the Fair Labor Stardards Act (FLSA)(29 U.S.C. Secs. 201 et seq.) by eight letter carriers, on behalf of themselves and other employees similarly situated. Approximately eleven thousand five hundred other letter carriers have become parties plaintiff to this action, by filing written consents with the district court, pursuant to the statutory mode of entry, set forth at 29 U.S.C. Sec. 216 (b).

This Petition for a Writ of Certiorari is brought by one of the eight named plaintiffs, Ernest R. Cummings; the district court having agreed to consider his claims as typical of those of the other plaintiffs.

The respondents are the United States of America, and the United States Postal Service, an independant establishment within the Executive Branch of the United States of America.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

KENNETH J. HILL, et al.,
Petitioner-Plaintiff,

vs.

UNITED STATES OF AMERICA, and
UNITED STATES POSTAL SERVICE,
Respondants-Defendants

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit is reported at 751 F.2d 810, and appears in Appendix A herein. The unreported Opinion and Judgment of the United States District Court for the Northern District of Ohio, Eastern Division, appears in Appendix B herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 22, 1985. This petition is filed within the period of time (ninety days) established by 29 U.S.C. Sec. 2101 (c). Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1254 (1).

STATUTES AND FEDERAL REGULATIONS INVOLVED

The following Statutes and Federal Regulations are quoted in the Appendix.

5 U.S.C. Sec. 5544 (Appendix C)

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STATEMENT OF THE CASE

This lawsuit was filed on December 12, 1980, against the United States Postal Service, an independent establishment within the Executive Branch of the United States of America. It was brought by eight (8) letter carriers, presently or formerly employed by the Postal Service, on behalf of themselves and other employees similarly situated, pursuant to the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. Sec. 207 (a)(1) and 29 U.S.C. Sec. 216 (b).

29 U.S.C. Sec. 216 (b) provides for recovery of damages for uncompensated time, an additional equal amount as liquidated damages, attorney fees and costs.

Pursuant to 29 U.S.C. Sec. 255 (a), actions for recovery may be commenced within three (3) years after the cause of action accrued, where the cause of action arises out of a willful violation.

Approximately eleven thousand five hundred (11,500) letter carriers have filed consents to become parties plaintiff, pursuant to the

statutory mode of entry set forth at 29 U.S.C. Sec. 216 (b).

The FLSA violation at issue is the Postal Service's failure to compensate letter carriers in its employ for that time designated as the lunch period. The one-half (1/2) hour, so designated,has been, and continues to be,automatically deducted from the letter carrier's eight and one-half (8-1/2) hour work day.

On cross-motions for summary judgment, the district court agreed to consider the claims of one of the eight named plaintiffs, Ernest R. Cummings, as typical of those of the other plaintiffs. The court entered judgment against Ernest R. Cummings, and he appealed.

The appeal was brought on questions of law, material facts not being in dispute. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the lower court on January 22, 1985.

STATEMENT OF FACTS

The petitioner, Ernest R. Cummings, is a full time letter carrier for the United States Postal Service. He clocks in an eight and one-half (8-1/2) hour workday, and gets paid for eight (8) hours. The Postal Service automatically deducts one-half (1/2) hour for that time designated as the lunch period. Petitioner's claim is for said uncompensated lunch period time for each workweek commencing with February 23, 1978, and continuing thereafter.

Postal Service regulations require employees to be credited with all time designated as work time under the FLSA, including work during meal periods. Its regulations further provide that, in order to disallow time on the clock for meal periods, the employee must be completely relieved of all duties and responsibilities.

Letter carriers are not relieved of all duties and responsibilities during their lunch period, as is shown by the following analysis of their work and workday.

From the outset of employment, letter

carriers are indoctrinated with two major concepts: the sanctity and security of the mail, and the importance of their high visibility in projecting the proper image of the Postal Service. These concepts are enforced through multiple, written Postal Service Policies, Rules and Regulations.

In order to project the proper image of the Postal Service, courtesy is not merely encouraged, it is a matter of written orders, such as: Be courteous and obliging in the performance of duties; when requested, furnish customers with postal and other reasonable information; accept letters and other prepaid small articles tendered by customers for mailing, and answer all inquiries courteously.

The letter carrier's workday consists of office time and street time. Office time is spent preparing the mail for delivery, and signing out for accountable items. Accountable items include COD, postage due, registered, certified and insured mail. Also included as an accountable item is the

Arrow Key, which opens Postal Service mailboxes in the entire area encompassed in the first three digits of the Zip Code number of the post office where the letter carrier is employed.

In keeping with the Postal Service's over-riding concern for the sanctity and security of the mail, an elaborate system must be followed for the recording and accounting of the above items.

Once the carrier has signed out for accountables, he is held individually responsible for them. He must account for the keys and the monies he has collected, and must either return a receipt, evidencing delivery, or return the article itself, if delivery was not accomplished.

Should any accountable item be lost or stolen, letter carriers are subject to disciplinary action, which could result in substantial loss of income. Letter carriers may also be required to bear the financial responsibility for the monetary value of a lost or stolen accountable item.

Upon completion of office time, letter carriers begin that part of their workday referred to as street time. They deliver mail, collect mail, accept mail from the public, obtain monies and receipts for certain mail, and provide courteous service to the public as requested.

Throughout their entire street time, letter carriers remain solely and completely responsible for the security of all accountable items and mail, and all other United States mail entrusted to their care. They are not relieved of these duties and responsibilities until they make an accounting to the Postal Service at the end of their workday. Until that time, they must obey multiple orders regulating mail security including the following: Protect all mail, money and equipment entrusted to your care; keep the mail in your possession or locked in a relay box or vehicle; protect the mail at all times; do not leave the mail ungarded.

During his work day, including the lunch

period, the petitioner, Ernest R. Cummings uses his own vehicle for transporting and securing undelivered mail. He is reimbursed for the use of his vehicle at a flat rate. His lunch period is scheduled at 12:45 p.m., during his street time. He is not relieved of his responsibility and accountability for the security of the mail during that time. When he goes to lunch, all the United States mail entrusted to his care goes with him, with accountable items, such as the Arrow Key, money and receipts remaining directly on his person.

The sanctity and security of the mail is of the same importance to the Postal Service during the letter carrier's lunch period as it is during any other part of his workday. He remains under the same Postal Service orders, under penalty of disciplinary action.

Courtesy to the public remains of the same importance to the Postal Service during the letter carrier's lunch period. He is in uniform and highly visible.

Further, the Postal Service's overriding concern for the sanctity and security of the mail requires that it have constant knowledge of the letter carrier's whereabouts and the mail in his possession. The Postal Service's need in this regard is guaranteed by a number of written policies, rules and regulations. These are all in accord with the parent mandate: "Do not deviate from your route for meals or other purposes unless authorized by a manager." Because of this Postal Service order, the letter carrier is required to submit three possible lunch places to his manager. If the manager finds them acceptable for Postal Service needs, he gives his authorization. After that is accomplished, the Postal Service further dictates lines of travel which the letter carrier must follow during his lunch period to reach and return from his authorized lunch location.

The letter carrier is obligated to comply with the above orders, under penalty of disciplinary action. To insure that the mail is being properly protected, and that there are

no deviations from the route, Postal Service supervisors are instructed to provide street supervision. One of the eight named plaintiffs in this action was suspended for five days when his supervisor observed that he was eating lunch one-half block away from his authorized lunch location. Another letter carrier was disciplined for attempting to use the lunch period as his own free time, by running a personal errand. Supervisors observed him during this time, and he was charged with deviating from his route during lunch. When the disciplinary action was grieved, the Postal Service stated that this was a serious infraction because: The letter carrier has mail of considerable value and importance in his possession; Postal management must have a means whereby the time of delivery and the location of the letter carrier can be immediately ascertained. The letter carrier must, therefore, remain immediately available at any given moment he is on duty. The Postal Service added that, "When the grievant left his route to run a

personal errand on his lunch period, he did so at his own peril. There is a possibility management would have granted permission were the reasons sufficiently urgent, and if the mail was adequately protected. Clearly he chose to run the risk of being caught."

The Postal Service policies, rules and regulations, referred to in the foregoing paragraphs, are more fully set forth in Postal Service manuals. Disciplinary actions, referred to above, are fully set forth in recorded grievance proceedings. All of this information was included in the extensive Appendix submitted to the Sixth Circuit.

The district court's findings of fact do not differ in any material manner from those set forth hereinabove. It was on these findings that the Sixth Circuit affirmed the decision of the district court denying petitioner's claim for lunch period compensation.

REASONS FOR THE WRIT TO BE GRANTED

I. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S CONSTRUCTION OF THE FAIR LABOR STANDARDS ACT, AND, IF THE DECISION IS PERMITTED TO STAND, IT WOULD EMASCULATE THE ACT OF ITS REMEDIAL PURPOSE.

This Court's construction of the Fair Labor Standards Act has been meticulously crafted to implement the statutory purpose. The Sixth Circuit was obligated to comply with that construction. It did not in this case.

The Sixth Circuit's opinion reflects a perfunctory recitation of this Court's decisions, but it gives no indication of how the law was applied to the facts. It, therefore, left the same question that was raised on appeal unanswered: Whether the district court erred in failing to construe the facts in accordance with the FLSA. In response, the Sixth Circuit merely stated that it approved the district court's conclusion that appellant's meal period is not compensable, because he was not required to perform any activities that could be characterized as

substantial duties. (Appendix A at 13a, para. 2) No authority was cited, nor did it otherwise explain the origin of the standard upon which it based approval.

It is respectfully submitted that the Sixth Circuit did not cite any authority for its reliance on a substantial duties standard, because that standard does not have its genesis in the FLSA. Instead, it arises from the Federal Employees Pay Act, (5 U.S.C. 5541 et seq.) which is not applicable to Postal Service employees. Under said Pay Act, which will be more fully addressed later, the performance of substantial physical duties was a prerequisite to recovery for meal periods.

The performance of physical labor has never been a prerequisite to recovery under the FLSA. If this Court had interpreted the Act to mean that employment time was compensable only if physical duties were performed, it would have done so more than forty years ago. However, this Court identified mental, not only physical exertion, as an element of work. Tennessee Coal Co. v. Muscoda Local,

321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944). At that same time, this Court also stated that there is nothing in the statute or in reason that demands that every moment of an employee's time, devoted to the service of his employer, shall be directly productive. Employees engaged in such necessary, but not directly productive activities as watching and guarding a building are entitled to the benefits of the Act. Tennessee Coal, supra, 321 U.S. 590, 599.

Thr Sixth Circuit disagreed with the above principles. It denied petitioner's claim, although finding that he remains responsible and accountable for protecting the security of accountable items and mail, as well as for all undelivered United States mail, throughout his lunch period. (Appendix A at 4a, para 2)

It would thus appear that the Sixth Circuit's evaluation and inquiry was limited by its misguided notion of what constitutes work under the FLSA. It was seemingly preoccupied with physical activity, as evidenced

by its comment that petitioner can eat comfortably without having to check his pockets regularly. (Appendix A at 16a, para. 2)

The Tennessee Coal definition of work was physical or mental exertion, whether burdensome or not, controlled or required by the employer, and pursued necessarily and primarily for the benefit of the employer. This Court, thereby determined that the degree of burden was of no consequence.

The Sixth Circuit took an opposite view, by stating that there may be cases where letter carriers are obliged to "conduct more substantial activities" during lunchtime and would be entitled to compensation. (Appendix A at 19a, para. 1) Contrary to this Court's dictates, the Sixth Circuit relied on its own notion of work in determining that, while petitioner is working during his lunch period, he is not working hard enough to be entitled to compensation.

Subsequent to Tennessee Coal, this Court held there need be no exertion at all. Hours worked are not limited to time spent in active

labor, but include any time given by the employee to the employer. Even inactive duty, spent in idleness or amusement, is compensable, where the employee is under orders, liable to be called upon at any moment, and not at liberty to go away. Armour & Co. v. Wantock, 323 U.S. 126, 65 S.Ct. 165, L.Ed. 118 (1944), and Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

The Sixth Circuit did not follow those fiats. Instead, it held that hours worked means only that time where the employee is performing substantial duties. From this erroneous posture, resulting from its failure to look to this Court for its answers, the lower court failed to see what it was required to see.

Early on in FLSA litigation, this Court immediately established that the employer's control and requirements are determinative components of compensable work time. Tennessee Coal Co. v. Muscoda Local, supra. In expanding its earlier definition of work, this Court did

not look at what the employees were doing by way of any specific task, but at the employer's control and requirements, with the resulting restrictive effect on the employees' free disposition of their time as they saw fit. Armour & Co. v. Wantock, supra, and Skidmore v. Swift & Co., supra.

The Sixth Circuit's opinion does not reflect any attention to these critical elements of work time. It did not analyze the circumstances of petitioner's lunch period, and the Postal Service policies, rules and regulations which control that time. Although the Sixth Circuit admitted petitioner's responsibility and accountability for mail security, it did not look to see what the Postal Service requires, or the orders petitioner is required to obey.

The sanctity and security of the mail is the overriding concern of the Postal Service. There are multiple written orders which petitioner must obey in order to properly protect the mail entrusted to his care. When petitioner goes to lunch,all accountable items,

and the undelivered United States mail goes with him. He must necessarily continue to follow the same orders, since the Postal Service does not relieve him of this obligation until he makes an accounting to the Postal Service at the end of his work day. The Postal Service insures that its orders are followed. If it finds a letter carrier is not protecting the mail in compliance with orders any time he is on duty, including his lunch period, disciplinary measures are exacted. This could result in lost wages or discharge. The fact that letter carriers are disciplined for failure to obey orders during their lunch period, necessarily means they remain subject to supervision during that time.

Upon these facts, which were not in dispute on appeal, the Sixth Circuit nonetheless concluded that the lunch period is petitioner's own time, and he is relieved of duty. (Appendix A at 16a, para. 1) The unreasonableness of such a conclusion undermines the Sixth Circuit's entire posture in this case.

Other determinative elements of work time were also not considered. The Sixth Circuit's opinion states that, "the limited selection of authorized lunch places does not render the meal period compensable." (Appendix A at 15a, para. 3) Nothing further was said. Missing, once again, is any analysis of what this means. The very use of the word "authorized" should have put the Sixth Circuit on notice to inquire further, but it did not.

Petitioner's lunch period restrictions are significantly more than mere happenstance. Postal Service policy requires that it have constant knowledge of the whereabouts of the letter carrier and the mail in his possession. For this reason, the letter carrier must be immediately available to the Postal Service at all times he is on duty, including his lunch period. For this same reason, he must be at an authorized lunch place, and must follow authorized lines of travel. For this same reason, he remains under Postal Service orders prohibiting him from deviating from his authorized route for lunch or any other

purpose. He must obey these orders under penalty of disciplinary action.

From the above, it is abundantly clear that the Postal Service treats the letter carrier's meal period as any other on duty time. The "limited selection", referred to by the Sixth Circuit, is not a choice, but a Postal Service requirement. To insure there is no break in the continuity of its direction and control, the Postal Service even dictates lines of travel which must be followed during the lunch period. If petitioner were free to choose, there are some ten (10) convenient places where he could have lunch. However, Postal Service orders do not permit him to do so.

The subject of disciplinary action is yet another determinative factor of petitioner's lunch period which the Sixth Circuit failed to evaluate. After one brief notation in the opinion, the matter was simply dropped. (Appendix A at 7a, para. 1)

This Court has long recognized disciplinary action as inherent to the element

of control. Jewell Ridge Coal Corp. v. Local, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534. (1945) Had the Sixth Circuit given even limited attention to this circumstance, it would have recognized that petitioner is not only on call, he is on active duty.

The Sixth Circuit concluded that petitioner's lunch period is his own time, and he is relieved of duty. It is respectfully submitted that an employee who is relieved of duty cannot, at the same time, be subject to disciplinary action for failure to execute his continuing duties in compliance with his employer's orders. An employee who is on his own free time, cannot, at the same time, be under orders to remain immediately available to his employer at any given moment. A meal period is either the employee's own time, or it is not. In this case, it surely is not.

Had the Sixth Circuit given even cursory examination to Postal Service manuals and recorded grievance proceedings, it could have avoided the superficial treatment it gave to this case.

Additionally, the Sixth Circuit concluded that petitioner's lunch period is not predominantly for the Postal Service's benefit. That conclusion cannot be supported when, as here, the meal period is so totally pervaded by the Postal Service's direction, control, restrictions, requirements, needs and discipline.

In the face of the substantive issue before it, and the essential determinations it omitted in deciding that issue, it is not clear why the Sixth Circuit so painstakingly addressed the de minimis rule. A thirty minute meal period is not a split second absurdity, or a negligible, unascertainable amount of time, to which the de minimis rule applies. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946). Because the rule is so obviously not applicable to this case, no further comment seems necessary.

Petitioner does not know why the Sixth Circuit did not follow its usual steady course in this case. Until the decision at issue, it demonstrated its fidelity to this Court's

construction of the FLSA, by holding that a meal period is compensable unless it is free time, during which the employee is free to serve his own interests, and do as he pleases. F. W. Stock & Sons, Inc. v. Thompson, 194 F.2d 493 (6th Cir. 1952). The standard so clearly articulated therein was in reliance on Armour and Skidmore, supra.

Now, to decide this case, the Sixth Circuit abandoned this Court's construction of the Act, as well as its own Sixth Circuit standard.

The Sixth Circuit's statement that "Appellant relies heavily on the language of 29 C.F.R. 785.19" (Appendix A at 13a, para. 1), suggests that it takes exception to said reliance. Petitioner had every reason to rely on 785.19. The Regulation is not different from, but a codification of, case law, including the Sixth Circuit's decision in F. W. Stock & Sons v. Thompson, supra. In accord with judicial construction of the FLSA, which the Department of Labor is obliged to uphold, 785.19 requires compensation for

meal periods unless the employee is completely relieved of duty, whether active or inactive. F. W. Stock & Sons, supra, was in turn decided in reliance on Armour and Skidmore, supra, which are codified at 29 C.F.R. 785.22. The inactive duty standard, enunciated in said decisions, require that meal periods and sleeping time of employees on duty 24 hours or more constitute hours worked, absent a contrary arrangement to which the employee has agreed. Where the employee is on duty less than 24 hours, no contrary arrangement is permitted. 29 C.F.R. 785.21 provides that when the employee is on duty less than 24 hours, he is working even though permitted to sleep or engage in other personal activities when not busy.

No substantial duties standard is mentioned in the aforesaid Code of Federal Regulations because this Court did not establish such a standard. Further, an on duty employee who is entitled to compensation for time spent sleeping, cannot at the same time be performing substantial duties. While the FLSA does not accomodate the Sixth Circuit's present decision

in reliance on a substantial duties standard, it is still FLSA law that must be followed in deciding an FLSA claim.

The Sixth Circuit referred to Department of Labor (DOL) letter which it felt was entitled to some credence, even though the district court did not rely on the opinion. (Appendix A at 15a, para. 2) This matter is only peripherally related, if at all, to the core of petitioner's argument. Therefore, petitioner's comments will be accordingly limited. The DOL has not issued a ruling on the letter carrier's meal period, because the Postal Service never asked for one. A letter written by a DOL deputy administrator in response to a one sentence inquiry from a nonemployer does not constitute a reasoned ruling to which credence may be given. The duties of the DOL are not to be confused with judicial authority to interpret the FLSA by reaching conclusions of law, based on findings of fact. Most importantly, the official position of the DOL is set forth at 29 C.F.R. 785.19, which requires compensation for meal

periods unless the employee is completely relieved of duty, whether active or inactive. As previously noted, the DOL's official position codifies judicial construction of the FLSA, as established by this Court. To the extent that any other writing by the DOL is inconsistent with 29 C.F.R. 785.19, and to the extent that it is conjectural, it is not to be afforded any weight. Skidmore v. Swift & Co., supra, and Jewell Ridge Corp. v. Local, supra.

And, finally, by following the course that it did, the Sixth Circuit reached a decision which would emasculate the FLSA of its remedial purpose. The intent of the Act is to guarantee compensation for all work time. In accord with the remedial intent of the Act, one of this Court's earliest directives was that it must not be interpreted or applied in a narrow, grudging manner. Tennessee Coal Co. v. Muscoda Local, supra. The Sixth Circuit was significantly more than narrow or grudging in its interpretation of the Act. It flatly refused to follow it. It would absolve the

Postal Service, and other employers who would follow the decision, of any obligation to compensate employees for time that is not their own free time, but time given to their employer. Under this decision, the employer would avoid liability by merely designating time as a meal period, while still requiring employees to continue to serve their employer's interests during that time.

Petitioner submits that the Court should grant certiorari in this case, because the Sixth Circuit has articulated a standard which is in clear conflict with this Court's long settled construction of the FLSA, and which emasculates the FLSA of its remedial purpose.

II. THE SIXTH CIRCUIT'S RELIANCE ON THE FEDERAL EMPLOYEES PAY ACT FRUSTRATES CONGRESSIONAL INTENT, AND THE STATUTE SO RELIED ON HAS NO APPLICABILITY TO PETITIONER'S FAIR LABOR STANDARDS ACT CLAIM.

Petitioner's claim was brought pursuant to the Fair Labor Standards Act. The 1974 amendment to the Act specifically identified Postal Service employees as employees within the meaning of the FLSA. 29 U.S.C. 203 (e)(2)(B).

From this fact alone, it is abundantly clear that the Sixth Circuit was obligated to decide the claim in compliance with this Court's construction of the FLSA, and not in accord with the Federal Employees Pay Act.

Further, petitioner is not now, nor has he been, subject to the Federal Employees Pay Act at any time material herein. His claim is for the period commencing with February 23, 1978, and thereafter. The Postal Reorganization Act, 39 U.S.C. 101, et seq., was enacted in 1970. Section 410 (a), therein, specifically excludes Postal Service employees from the Federal Employees Pay Act.

From the aforesaid enactments, Congressional intent,as to both the FLSA and the Pay Act, could not be any plainer than it is.

These matters were before the Sixth Circuit on petitioner's second assignment of error, challenging the district court's denial of the claim in reliance on the inapplicable Federal Employees Pay Act. The Sixth Circuit summarily dismissed the challenge as being without merit, and was otherwise silent on this matter.

The Sixth Circuit stated that it approved the district court's conclusion that appellant's meal period is not compensable because he was not required to perform any activities that could be characterized as substantial duties. (Appendix A at 13a, Para 2) No authority was cited, nor was the genesis of the standard it approved explained at any point in the Sixth Circuit's opinion.

It is necessary to look to the district court's opinion, which appears in Appendix B. The substantial duties standard is identified therein as arising from the Court of Claims'

construction of the Federal Employees Pay Act. Included in the district court's opinion (Appendix B at 35a and 36a) is an extensive quotation from one such Court of Claims case, Bennett v. The United States, 194 Ct.Cl. 889 (1971)

In Bennett, supra, the plaintiffs brought a claim for meal period compensation, pursuant to the Federal Employees Pay Act, and substantive rights were determined in compliance with its specific provisions. The Pay Act, 5 U.S.C. Section 5544, automatically excluded compensability for eating and sleeping time of employees who were required to remain at or within the confines of their post of duty, in a stand by or on call status. Because of this exclusionary proviso, the Court of Claims formulated a substantial duties standard, as a prerequisite to recovery. As explained in the Bennett case, substantial duties meant the performance of physical labor. The Court was inclined to grant the lunch period claim since the plaintiffs were required to be aboard navy vessels from 7:30 a.m. until 4:00 p.m., and

had continuing responsibilities to their employer during that entire time. However, in the presence of the specific exclusionary proviso of the Federal Employees Pay Act, it was constrained from doing so, because the plaintiffs were able to eat their lunch without performing substantial physical duties.

Therefore, the issue before the Court of Claims in Bennett was what constitutes compensable time under the exclusionary proviso of the Federal Employees Pay Act, and not what constitutes compensable work time within the meaning of the FLSA.

Under the Federal Employees Pay Act in Bennett, the sole dispositive factor was the performance of physical labor.

The FLSA has no such exclusionary proviso, and physical labor has never been a prerequisite to recovery. Tennessee Coal Co. v. Muscoda Local, supra, Armour & Co. v. Wantock, supra, Skidmore v. Swift & Co., supra, and F. W. Stock & Sons, Inc. v. Thompson, supra.

Under the FLSA, and in accord with this Court's construction of the Act, the Sixth

Circuit's clearly articulated standard requires compensation for lunch period time, unless it is free time during which the employee is free to serve his own interests and do as he pleases. F. W. Stock & Sons v. Thompson, supra.

However, in this case, the Sixth Circuit abandoned FLSA standards and held, instead, that petitioner's lunch period obligations do not entitle him to compensation because he is not performing substantial physical duties. As has been shown, that standard is a Pay Act Standard, which has no applicability to petitioner,or to his FLSA claim.

While the Sixth Circuit did not take notice that the Federal Employees Pay Act has no applicability to petitioner's FLSA claim, the Court of Claims duly acknowledged the demise of the Federal Employees Pay Act, and the standards that went with it. In Beebe v. United States, 640 F.2d 1283 (Ct.Cl. 1981), Federal fire fighters, who had previously been under the Federal Employees Pay Act, brought claims for eating and sleeping time, pursuant to the FLSA. Their employer

tenaciously relied on the Federal Employees Pay Act, by way of attempted defenses. The Court of Claims held such arguments were to no avail, in that the Pay Act had no effect on rights the plaintiffs had now acquired under the FLSA. Consequently, the Beebe Court held plaintiff's substantive rights were now governed by the FLSA, which did not automatically exclude eating and sleeping time, and the claims were granted.

Thus, the Pay Act was superseded ten years ago by the FLSA, even as to those employees to whom it once applied.

With the long history of the FLSA, and its well settled law, there was no cause for the Sixth Circuit to reach for another statute. Nevertheless, it did. As a result, petitioner's claim was denied, not because his lunch period is not compensable, but because the Sixth Circuit disregarded his rights under the FLSA, erroneously placed his claim under a statute from which he is specifically excluded, and relied totally on a Pay Act standard which has no applicability to FLSA claims.

Therefore, the Sixth Circuit's decision was premised on error upon error, all of which has resulted in a manifest injustice.

Petitioner submits that the Court should grant certiorari in this case because the Sixth Circuit's decision represents a complete departure from this Court's long established construction of the FLSA, and because it frustrates Congressional intent requiring the Postal Service to comply with the Fair Labor Standards Act.

III. THE SIXTH CIRCUIT FAILED TO MAKE UNIFORM APPLICATION OF THE FAIR LABOR STANDARDS ACT BY DEPRIVING THE PETITIONER OF THE SAME APPLICATION OF THE ACT AFFORDED EMPLOYEES IN THE PRIVATE SECTOR.

This Court holds that, through enacting the Fair Labor Standards Act, Congress intended to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944)

The Sixth Circuit did not maintain the uniformity of national policy in this case, because it failed to protect petitioner's right to be compensated for all time worked. After finding that petitioner is engaged in work throughout his lunch period, it, nonetheless, held that he was not entitled to compensation.

The Sixth Circuit stated that its holding was based on the need for a flexible and realistic standard, and on the particular circumstances of this case. (Appendix A at 13a, para. 2)

From the statement, it would appear that

the Sixth Circuit misapprehended its task from the outset. It was not requested to find a new standard, but to apply established FLSA standards to the facts of this case. It was also not requested to determine if the FLSA was realistic. Indeed, that would not have been a proper inquiry, since that determination had long been made by Congress and this Court.

In 1974, the FLSA was amended to include the public sector. 29 U.S.C. Section 203(e)(2)(B) specifically identifies United States Postal Service employees as employees within the meaning of the Act. By the time of said Amendment, Congress had had thirty-six years to reflect on whether the Act, and the Supreme Court's construction of it was realistic. During those years, Congress also had ample opportunity to make whatever changes it deemed appropriate. The changes that were made have no impact on petitioner's claim, except to definitively establish his rights under the Act. The 1974 amendment speaks clearly to Congressional affirmation of the Act as a realistic requirement of the employer, and a

necessary remedy for the employee. Had Congress not deemed it appropriate to include the Postal Service, it would have omitted it as an FLSA employer. However, it did not. By enlarging the scope of the FLSA, Congress obligated the courts to make the same application of the law to the newly included public sector employees, as had long been made to employees in the private sector.

This Court has determined that all employers under the Act must respect the statutory pattern to spread employment through the overtime pay requirement. This Court has also recognized that this may require modifications or adjustments in existing customs, but that if these are not made, the plain language and policy of the Act are frustrated. Jewell Ridge Coal Corp. v. Local, 325 U.S. 161, 65 S. Ct. 1063, 89 L. Ed. 1534 (1945)

The particular circumstances of this case are that the Postal Service did not modify or adjust its customs for letter carriers, when it became an FLSA employer. The Postal Service continued to exercise direction and control over the letter carrier, and continued to require him

to serve its purpose for its benefit, during uncompensated meal period time, just as it had in the past.

Private sector employees have been entitled to the benefits of the Act since 1938. Their claims have been decided in accordance with this Court's well settled principles. As an employee in the federal sector, the petitioner has the unequivical, statutory right to have his claim decided by the same application of FLSA law. Petitioner has been deprived of that right by the Sixth Circuit.

Under the Sixth Circuit's decision, the fundamental FLSA intent, requiring a uniform national policy for all FLSA employers, has not been maintained. In contravention of the Act, the Sixth Circuit has granted the Postal Service leave to continue petitioner's eight and one-half (8-1/2) hours of work time each day, without any obligation to compensate him for one-half (1/2) hour of that time.

Thus, the Sixth Circuit's decision would make an exception to the FLSA, by applying inapplicable non FLSA law to petitioner's

claim, in order to accomodate the Postal Service.

In so prejudicing petitioner's rights, the Sixth Circuit has repudiated the uniform application of the Act, which this Court has held essential to a just result. Jewell Ridge Coal Corp. v. Local, supra.

Petitioner submits that certiorari should be granted in this case because the Sixth Circuit's decision makes an unauthorized exception to the FLSA, thereby defeating its uniform application, and creating industrial uncertainty and discord.

CONCLUSION

Petitioner respectfully submits that certiorari and a hearing on the merits should be granted in this case, because the Sixth Circuit's decision is not in reliance on, but in avoidance of, controlling law. As a result, petitioner's claim was removed from the Fair Labor Standards Act, under which it was properly brought, and decided in reliance on the Federal Employees Pay Act, which has no applicability to Postal Service employees. Additionally, this case is reported as having been decided in reliance on the FLSA, when it is, in fact, a decision in reliance on the substantial duties standard, derived from the Federal Employees Pay Act. Because the Sixth Circuit's opinion does not identify the genesis of said standard, and because said standard is a complete departure from this Court's long settled construction of the FLSA, the decision creates industrial uncertainty and discord.

For the above reasons, with their ramifications to the entire pattern and purpose

of the Fair Labor Standards Act, this case merits a grant of certiorari.

Respectfully submitted,

GABRIELLE GULYASSY KINKELA
(Counsel of Record)
VICTOR J. GULYASSY
ROBERT V. KINKELA
GULYASSY, KINKELA & KINKELA
6461 Pearl Road, Suite One
Parma Heights, Ohio 44130
216-842-1313
Counsel for Petitioner
Kenneth J. Hill, et al.

Dated: April 22, 1985

No. 83-3655

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH J. HILL, et al.,	)	
Plaintiffs-Appellants,	)	ON APPEAL from the United States District Court for the Northern District of Ohio
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants-Appellees.	)	

Before ENGEL and KENNEDY, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge.

This case involves the claim of one city letter carrier, Ernest Cummings, who alleges entitlement to wages and compensation withheld by the Postal Service allegedly in violation of the Fair Labor Standards Act (FLSA) 29 U.S.C. 201-219. This action was brought originally by eight letter carriers, and approximately 12,000 postal employees filed consents to become parties plaintiff pursuant to 29 U.S.C. 216(b). On cross-motions for summary judgment in the district court, the court agreed

to consider the claims of appellant Cummings as typical of those of the other plaintiffs. The court entered summary judgment against Cummings and he appeals.

I

Cummings argues that the Postal Service has violated the Act by failing to compensate letter carriers for the one-half hour designated as the lunch period. This period is automatically deducted from the eight and one-half hour work day clocked in by letter carriers. Cummings argues that the Postal Service does not comply with the requirement in 29 U.S.C. 207 that employers must pay employees who work in excess of forty hours per week at a rate one and one-half times the normal hourly wage.[1]

1. 29 U.S.C. 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one

half times the regular rate at which he is employed.

Cummings is employed as a city letter carrier at the North Olmsted Post Office near Cleveland, Ohio. He clocks in each morning wearing a full uniform. He begins his day with "office time," when he prepares mail for delivery and signs out accountable items including a Postal Service key, and accountable mail such as COD, postage due, registered, certified, and insured mail. He then begins delivering mail, accepting mail for delivery, and collecting receipts and money for certain mail.

Cummings receives a half hour lunch break between 12:45 and 1:15 p.m. He has a choice of three lunch places chosen by him and approved by his supervisors. He proceeds from his delivery route to an authorized lunch place by an authorized line of travel. The Postal Service automatically deducts this half hour from Cummings' pay. Cummings is paid for eight hours of work.

City letter carriers generally cannot carry their entire day's mail in their shoulder

satchels. Therefore, their routes are broken down into segments known as relays. Relay boxes are containers placed along delivery routes in which mail is stored until the carrier reaches the relay box. The carrier will have delivered the mail in his or her satchel before reaching the relay box and will be ready to fill it again from the contents of the relay box, to deliver the next segment of his or her route. The lunch period begins when the letter carrier secures his or her shoulder satchel in a relay box and begins walking to lunch, or, in Cummings' case, when he secures undelivered mail in his vehicle and drives his vehicle from his route to an authorized lunch place by an authorized line of travel.

During lunch, letter carriers remain responsible and accountable for the security of accountable items and mail as well as for the undelivered mail. Accountable mail includes customs duty mail, postage due mail, and special services mail. Cummings carries with him to lunch, and is responsible for, the following items:

(1) a list of the accountable mail that has not been delivered prior to lunch;

(2) receipts for the accountable mail which has been delivered prior to lunch;

(3) monies appellant may have collected from deliveries of COD mail prior to lunch;

Cummings argues that he is in uniform during his lunch, is highly visible, and "serves the public as requested, including providing information and accepting mail." Postal regulations require letter carriers to be "courteous and obliging in the performance of duties," to furnish customers with postal information and postal forms, and to accept letters and prepaid first-class mail from customers. Despite the Postal Service's emphasis on courtesy, however, there is no postal regulation requiring city letter carriers to accept mail from the public during their meal periods or otherwise conduct postal business in response to inquiries from members of the public during their meal periods.

Grady S. Dorsey, Superintendent of Postal Operations at the North Olmsted Post Office, and supervisor of appellant Cummings, had numerous discussions with city letter carriers,

including Cummings, regarding their activities. He stated, in a declaration before the district court, that he could not recall any discussions regarding customers interrupting the carriers' lunches. Similarly, Gary A. Weiss, Manager of Delivery and Collections and a route inspector at the same post office who had conducted over five hundred route inspections, declared that he did not recall ever seeing a postal patron interrupt a carrier while at lunch requesting him to accept or deliver mail, or to provide any other postal service or information. Weiss stated that he had accepted mail at lunchtime, once per week or so, while he was a letter carrier, but was not required to do so. Weiss stated that although he had had thousands of discussions with letter carriers, he did not recall that any carriers mentioned being interrupted by customers at lunchtime. Appellant submitted the deposition of letter carrier Roach, who testified to frequent interruptions at lunchtime from customers seeking information or service.

Appellant emphasizes that he is not relieved of accountability for all mail, money

and equipment entrusted to his care until the end of the workday. Letter carriers are subject to discipline for failure to exercise reasonable care for the items in their care and for the mail secured in postal vehicles and relay boxes. Appellant is not required to eat in the vehicle or to keep the vehicle in sight during the lunch period.

II

The district court held that the restrictions on appellant's time during his lunch period did not interfere with the free disposition of his lunch period. It held that he had no substantial duties at this time that would inhibit his ability adequately and comfortably to pursue interests of a private nature. Therefore, the court held that the Postal Service was not obligated to compensate Cummings for his meal period. We affirm.

[1] The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201-219 (FLSA), was made applicable to the Postal Service by amendment effective May 1, 1974. As stated above, 207(a)(1) forbids employers from

employing employees for more than forty hours per week without compensating employees at a higher rate. The Act does not define "work" and leaves the definition to the courts. Work includes "physical or mental exertion" for the employer's benefit, see Tennessee Coal, Iron & Railroad Co. v. Muscoda Local 123, 321 U.S. 590, 598, 64 S.Ct. 698, 703, 88 L.Ed. 949 (1944), as well as stand-by or waiting time, Armour & Co. v. Wantock, 323 U.S. 126, 65 S.Ct. 165, 89 L.Ed. 118 (1944); Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

In Armour & Co., the Supreme Court held that private fire fighters employed by a soap factory were entitled to compensation for time spent on call. The Court cautioned against reading the words of previous opinions out of the context of the facts of the case under discussion. 323 U.S. at 132-33, 65 S.Ct. at 168. It therefore held that compensability under the FLSA was not limited by the language in Tennessee Coal, Iron & Railroad Co. referring to "physical or mental exertion." The Court then held, "Whether time is spent predominantly for the employer's

benefit or for the employee's is a question dependent upon all the circumstances of the case." 323 U.S. at 133, 65 S.Ct. at 168.

In Skidmore, the Court reiterated its holding that inactive duty may be compensable and emphasized that each case "must stand on its own facts," 323 U.S. at 140, 65 S.Ct. at 164. The Court also held that administrative interpretations of the compensability of particular worktime, while not conslusive or binding on the courts, are entitled to respect. Id. at 139-40, 65 S.Ct. at 164. "The weight of such a judgment in a particular case," the Court held, "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its conspiracy with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Id. at 140, 65 S.Ct. at 164.

The Sixth Circuit addressed the compensability of meal periods under the FLSA in F. W. Stock & Sons v. Thompson, 194 F.2d 493 (6th Cir.1952). The court held that the meal period in that case was compensable because

mill workers were required by the nature of their work and their employer to pay "constant attention" to their machinery and because "[t]heir lunch periods were often interrupted by emergencies requiring immediate attention." Id. at 496. The Court held:

> So it seems to have been proven adequately that the employees did not have a free lunch period during which they could serve their own interest and do as they pleased, but that their duties and responsibilities to their employer were continued during the lunch periods. As the District Judge well said during a colloquy with counsel: "A man who has to oil machinery with a sandwich in his hand is not having a free lunch period." He made the further appropriate comment that a man who has to have his eyes glued upon the watching of grain coming down from floors above and be careful that there is no stoppage during the entire eight hours of his shift, including his lunch period, does not have a free lunch period.

Id. The Court proceeded to adopt the district court's standard for determining compensability:

"Time spend predominantly for the employer's benefit during a period, although designated as a lunch period or under any other designation, nevertheless constitutes working time compensable under the provisions of the Fair Labor Standards Act."

Id. at 496-97 (citation omitted). The court relied on the Supreme Court's language in Armour & Co., supra, 323 U.S. at 133, 65 S.Ct. at 168.

Department of Labor regulations, adopted by the Administrator of the Wage and Hour Division, are intended to serve as a guide to employers and employees. 29 C.F.R. 785.2 (1983). The district court recognized that these guidelines are not binding but may be considered by the courts. Section 785.19, which defines a bonafide meal period, provides that the meal period is not compensable where the employee is "completely relieved from duty and for the purposes of eating regular meals."[2]

2. C.F.R. 785.19 provides:

> 785.19 Meal.
> (a) Bonafide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for

snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. Culkin v. Glenn L. Martin, Nebraska Co., 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F.2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc., 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); Biggs v. Joshua Hendy Corp., 183 F. 2d 515 (C.A. 9, 1950), 187 F.2d 447 (C.A. 9, 1951); Walling v. Dunbar Transfer & Storage Co., 3 W.H. cases 284; 7 Labor Cases para. 61.565 (W.D. Tenn. 1943); Lofton v. Seneca Coal and Coke Co., 2 W.H. Cases 669; 6 Labor Cases para. 61,271 (N.D. Okla. 1942); aff'd 136 F.2d 359 (C.A. 10, 1943); cert denied 320 U.S. 772 (1943); Mitchell v. Tampa Cigar Co., 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); Douglass v. Hurwitz Co., 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

III

Appellant relies heavily on the language of 29 C.F.R. 785.19. He argues that the district court improperly considered the degree of the burden or extent of obligation during the meal period. Analogizing his case to those where an employee is on call, he seeks a standard where time is compensable even though the employee has no substantial duties during his or her meal period. Appellee, however, contends that the "degree of freedom" accorded an employee and whether time spent is "predominantly for the employer's benefit" are legitimate considerations for determining compensability.

[2] We approve the district court's conclusion that appellant's meal period is not compensable because he was not required to perform any activities that could be characterized as substantial duties. Our holding is based on the need for a flexible and realistic standard for compensability and on the particular circumstances of this case.

Appellant challenges the district court's

reliance on an opinion letter from the Deputy Administrator of the Wage and Hour Division of the Department of Labor in response to a letter from counsel for the National Association of Letter Carriers. The letter addressed the question of compensability of the letter carriers' meal period in light of 29 C.F.R. 785.19:

> While the courts and the Department (in its Interpretative Bulletin, 29 C.F.R. 785.19) have on occasion broadly stated that compensation is required for meal periods unless the employees are relieved of all duty, it is obvious from the cases under consideration [those cited in section 785.19(a)] that the duties in contemplation were those which restricted the employees in the free disposition of their lunch time.
>
> * * *
>
> The broad reading of the phrase "relieved of all duty" adopted in your letter would extend the requirement of compensation to 24 hours of the day in the case of outside workers who are required to take their employer's tools or materials home with them or who drive home in the company's vehicles, so as to have

them available for going directly to the work site the following morning.

Appellant argues that the opinion is not entitled to great weight because it was not based on thorough consideration or careful analysis. See Skidmore v. Swift & Co., supra, 323 U.S. at 140, 65 S.Ct. at 164. It is clear, however, that the opinion letter is entitled to some credence and also that the district court did not rely on the opinion at the expense of its own analysis. Similarly, appellant's challenge to the court's reliance on Court of Claims cases decided under the Federal Employees Pay Act, 5 U.S.C. 5544 is without merit.

Appellant's obligation to exercise due care in securing the mail in his vehicle is a duty originating before his meal period. The fact that this duty is not discharged during the meal period does not mean that this time is not his own. Nor does the limited selection of authorized lunch places render the period compensable. As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time

predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA.

Appellant's responsibility for accountable items and receipts, which he must carry during meals, does not require him to engage in any substantial activities or interfere with his lunch period to such an extent that the FLSA would require compensation. He is not required to exercise constant vigilence; he can eat comfortably without having to check his pockets regularly or be otherwise distracted from his meal. Moreover, Gary A. Weiss, Manager of Delivery and Collections in appellant's district, stated in his affidavit that Cummings delivered only 154 pieces of accountable mail in the 1981 fiscal year. This means he carried receipts three or four times per week. Cummings carried COD money even less frequently.

Finally, we conclude that appellant did not show that he is subject to frequent or even occasional interruptions by postal patrons during his meal period. Interruptions of appellant's lunch by customers seeking information are infrequent and appellant is not required

to accept mail or sell stamps at this time. Any interference with appellant's meal period for this reason would be purely de minimis.

In Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), the Supreme Court recognized a de minimis rule in FLSA cases:

> We do not, of course preclude the application of a de minimis rule where the minimum walking time is such as to be negligible. The workweek contemplated by 7(a) must be computed in light of the realities of the industrial world. When the matter in issue concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded. Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is required to give up a substantial measure of his time and effort that compensable working time is involved. The de minimis rule can doubtless be applied to much of the walking time involved in this case, but the

> precise scope of that application can be determined only after the trier of facts makes more definite findings as to the amount of walking time in issue.

Id. at 692, 66 S.Ct. at 1195. Recently, the Ninth Circuit applied the de minimis rule in Lindow v. United States, 738 F.2d 1057 (9th Cir.1984). There the Court held that employees of the United States Army Corps of Engineers were not entitled to compensation for short periods of time before their shifts began when they read and discussed the log book with the preceding shift. The court stressed that the employees were not required to come in early for this purpose and emphasized the difficulties in accounting for small and varying periods of time. Therefore, the court held the seven or eight minute periods at issue were not compensable under the FLSA. Id. at 1062 (citations omitted).

The district court concluded correctly that appellant is not entitled to compensation for his meal period. We emphasize that this opinion is addressed to the particular facts of the present case. There may be cases where letter

carriers are obliged to conduct more substantial activities during lunch time and would be entitled to compensation. In the present case, however, we agree with the district court that appellants are not entitled to relief.

The decision of the district court is AFFIRMED.

No. 83-3655

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENNETH J. HILL, et al.,	)	
Plaintiffs-Appellants,	)	ORDER ON
v.	)	Petition for
UNITED STATES OF AMERICA, et al.,	)	Rehearing
Defendants-Appellees.	)	

Before: ENGEL and KENNEDY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

A petition for rehearing en banc was filed by appellants on December 18, 1984. A majority of the judges in regular active service having not voted in favor of en banc consideration, the petition has been referred to the original hearing panel for disposition.

Upon consideration, it is ORDERED that the language quoted below appearing on pages 10 and 11 of the slip opinion, be and hereby is transferred to the end of the second paragraph of part II of the slip opinion at page 8:

Appellant challenges the district

court's reliance on an opinion letter from the Deputy Administrator of the Wage and Hour Division of the Department of Labor in response to a letter from counsel for the National Association of Letter Carriers. The letter addressed the question of compensability of the letter carriers' meal period in light of 29 C.F.R. 785.19:

> While the courts and the Department (in its Interpretative Bulletin, 29 C.F.R. 785.19) have on occasion broadly stated that compensation is required for meal periods unless the employees are relieved of all duty, it is obvious from the cases under consideration [those cited in section 785.19(a)] that the duties in contemplation were those which restricted the employees in the free disposition of their lunch time.
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> * * *
>
> The broad reading of the phrase "relieved of all duty" adopted in your letter would extend the requirement of compensation to 24 hours of the day in the case of outside workers who are required to take their employer's tools or materials home with them or who drive home in the company's vehicles, so as to have them available for going directly to the work site the following morning.

Appellant argues that the opinion is not entitled to great weight because it was not based on thorough consideration or careful analysis. See Skidmore v. Swift & Co., supra, 323 U.S. at 140. It is clear, however, that the opinion letter is entitled to some credence and also that the district court did not rely on the opinion at the expense of its own analysis. Similarly,

appellant's challenge to the court's reliance on Court of Claims cases decided under the Federal Employees Pay Act, 5 U.S.C. 5544 is without merit.

It is further ORDERED that the sentence beginning in the sixth line on the top of page 11 of the slip opinion become a part of the next paragraph, so that the language on page 11 of the slip opinion, as revised, will read as follows:

> The district court concluded correctly that appellant is not entitled to compensation for his meal period. We emphasize that this opinion is addressed to the particular facts of the present case. There may be cases where letter carriers are obliged to conduct more substantial activities during lunch time and would be entitled to compensation. In the present case, however, we agree with the district court that appellants are not entitled to relief.
>
> The decision of the district court of AFFIRMED.

It is further ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the Court.

John Heman
Clerk

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Kenneth J. Hill, et al.,	)	
	)	CASE NO. C80-2312
Plaintiffs,	)	
	)	
vs.	)	
	)	
United States Postal Service, et al.,	)	MEMORANDUM OPINION
	)	
Defendants.	)	

Before the Court is the motion of the defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The plaintiffs, in addition to responding to the defendants' motion for summary judgment, have also filed a cross motion for summary judgment. For the reasons stated below, the defendants' motion is granted, and the plaintiffs' motion is denied.

The present lawsuit was filed on December 12, 1980, against the United States Postal Service pursuant to the Fair Labor Standards Act of 1938 (FLSA), as amended, 29 U.S.C. 201 et. seq.

At a status conference on January 19, 1983, the parties agreed to present cross motions for summary judgment on the claims of one of the numerous plaintiffs.[1]

1. Approximately 12,000 postal employees have filed consents to become party plaintiffs pursuant to 29 U.S.C. 216(b)

Subsequently, the defendant submitted that the claims of Ernest R. Cummings were typical and that plaintiffs should file their cross motion on the claims of Ernest R. Cummings. In light of the fact that the plaintiffs agreed to file their cross motion for summary judgment on the claims of Mr. Cummings alone, the defendants agreed to withdraw their counterclaim against Mr. Cummings set forth in the defendants' second motion for leave to amend and supplement their answer.

Accordingly, the Court shall rule on the motions in regard to the plaintiff Ernest R. Cummings, without considering the counterclaim asserted by the defendants against the plaintiff, Ernest R. Cummings.

At all times relevant to this action, Ernest Cummings has been employed by the Postal Service as a city letter carrier within the

Cleveland MSC, specifically at the North Olmstead Post Office. The plaintiff clocks in in the morning in full uniform, which includes authorized pants, shirt, shoes, jacket, hat, and badge. The first part of the plaintiff's day is "office time" used for preparing mail for delivery and signing out for accountable items. The accountable items include keys, COD, postage due, registered, certified, and insured mail. Upon completion of his office time, the plaintiff commences with the remainder of his work day which is referred to as street time which includes the delivery of mail, accepting mail for delivery, and collecting monies and receipts for certain mail.

The plaintiff, Mr. Cummings, receives a half hour lunch break commencing at 12:45 p.m. and to be completed by 1:15 p.m. Mr. Cummings has a choice of three lunch places which are authorized by management to which he may go for lunch. The plaintiff travels from his delivery route to an authorized lunch place by an authorized line of travel. The plaintiff clocks in an eight and one half hour work day but is paid for only eight hours. The United

States Postal Service automatically deducts one half hour for the authorized lunch period.

The alleged FLSA violation, at issue, is the Postal Service's failure to compensate letter carriers in its employment for that period of time designated as the lunch period. The plaintiff alleges that the one half (1/2) hour, so designated, has been and continues to be, automatically deducted from the eight and one half (8-1/2) hour workday clocked in by the letter carriers in violation of the FLSA. Specifically, the plaintiff contends that the one half hour presently deducted from his pay violates the FLSA as the one half hour deducted does not amount to a bonafide meal period and, therefore, he is entitled to be paid one half hour overtime.

The act provides in 29 U.S.C. 207 that "no employer shall employ any of his employees" for more than 40 hours a week unless they are paid one and a half times their regular rate for all time in excess of 40 hours.[2]

2. 29 U.S.C. 207 (a) provides:

Except as otherwise provided in this

> section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer then 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed.

The primary aim of the act is to protect employees from the exploitation of substandard wages and excessive hours. 29 U.S.C. 202; e.g. Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945).

Under the act "employ" includes to suffer or permit to work. 29 U.S.C. 203(g). But the Act does not define "work" and leaves the definition to the Courts. In Tennessee C.I.R. Co. v. Muscoda Local, 321 U.S. 590, 598 (1944), the Supreme Court defined "work" as including "physical or mental exertion" for the employer's benefit. In subsequent cases the Court held that "work" is not limited to "exertion" for the employer's benefit. It also includes anytime which the employee spends in behalf of his employer such as stand-by or waiting time. Armour & Co., v. Wantock, 323 U.S. 126 (1944);

Skidmore v. Swift & Co., 323 U.S. 134 (1944). However, where an employee is completely relieved of his employment obligations during any particular time and can use that time for his own purposes, he is not entitled under the act to be compensated for the time. 29 C.F.R. 785.16.

In regards to whether an individual receives a bonafide meal period, 29 C.F.R. 785.19 implemented by the Department of Labor, provides:

> (A) Bonafide meal periods. Bonafide meal periods are not work time. Bonafide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily thirty minutes or more is long enough for a bonafide meal. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker is required to be at his machine, is working while eating. (B) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

Section 785.19 while not binding on the Court, does provide an insight into the Wage Hour Administrators Enforcement Policy in

in determining whether or not the meal period is compensable. 29 C.F.R. 785.2.

The plaintiff asserts several bases for his belief that his one half hour for lunch is not a bonafide meal period pursuant to the FLSA. The plaintiff's contentions are as follows:

I. That the plaintiff remains under the continuing direction and control of the United States Postal Service. Throughout his lunch hour, the plaintiff may only be where the Postal Service authorizes him to be, and he is instructed how to get there and how to return.

II. The plaintiff continues to be responsible and accountable to the United States Postal Service for mail and other items entrusted to his care.

III. The plaintiff is subject to occasional interruptions while on his lunch period.

IV. The plaintiff is subject to disciplinary action for failure to properly execute those duties and responsibilities which continue throughout his meal.

The sole issue in the present case is whether the plaintiff's lunch period is a

bonafide meal period, or time worked, within the meaning of the Fair Labor Standards Act of 1938, as amended. The test developed by the Courts to determine whether or not the plaintiff actually enjoys a bonafide meal period is determined on the basis of whether during the time in question the employee is actually free to pursue his private needs or pleasures, or whether the time spent is predominantly under the control of the employer and for the employer's benefit. F.W. Stock and Sons, Inc. v. Thompson, 194 F.2d 493 (6th Cir. 1952); Baker v. United States, 23 W.H. Cases 1224 (1978); Hernandez v. Ethyl Corp., 12 W.H. Cases 665 (1955).

The plaintiff's first contention is that the defendant, Post Office, limits the number of places where the plaintiff may go for lunch and furthermore, authorizes a line of travel to and from the plaintiff's authorized lunch places. The defendant asserts that due to the nature of the relationship between the letter carrier, the postal service and the public, it is imperative that the Post Office have knowledge of the whereabouts

of the letter carriers and the mail in their possession.

It is settled that the mere fact that an employee is required to eat lunch on the employer's premises and to be in a duty status and subject to call during such period, does not automatically make such period "overtime." The actual performance of substantial duties during such period is a prerequisite to recovery. Bowling v. The United States, 181 Ct. Cl. 968 (1967). As noted above, 29 C.F.R. 785.19 (B) provides "It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period." In Baker, supra, the Court found that although the plaintiffs were restricted to the confines of a boat during the lunch period which limited their activities, that alone was not sufficient to convert the lunch period into work time, if they were otherwise free to do as they pleased.

Thus, the fact that the plaintiff is limited to several places where he may go for lunch, does not deny plaintiff a bonafide meal period unless the plaintiff is required to perform

substantial duties during his lunch period.

Several Courts have previously found employees to be deprived of a bonafide meal period. In Culkin v. Glenn L. Martin Nebraska Co., 97 F.Supp. 661 (D. Neb. 1951), the Court held that a thirty minute lunch period of the plant guards was compensable as working time, even though the employees were permitted to leave their post of duty and were theoretically relieved of all duties whatsoever. The Court found that the defendant company not only accepted the usefulness of the protective force during the lunch period, but imposed restrictions which would guarantee the same. The restrictions requiring the employees to eat in certain areas, to remain in full uniform, to be constantly vigilant for signals and calls, to check for badge infractions, and to prevent disturbances, deprived the employees of that degree of freedom during the lunch period which would have enabled them to adequately and comfortably enjoy the time as their own. The Court found that the plaintiff's were actually performing the duties for which they were paid.

In F.W. Stock & Sons, supra, the Court found that the employees did not have a free lunch period during which they could serve their own interests and do as they pleased, but that their duties and responsibilities to their employer continued during lunch periods. The Court found that the engineers did not leave their engines unattended, but ate with one eye on the same, while the packers, millers, and oilers ate in the immediate vacinity of their machine, upon which constant attendance was required so that the machinery could continue to operate without breakdown. The Court noted "a man who has to oil machinery with a sandwich in his hand is not having a free lunch period."

The basis for the courts finding that the employees did not receive a bonafide meal period in the above cases, was that the employee's could not adequately and comfortably pursue their meal and that they actually engaged in the performance of substantial duties. However, in Baker, and Bowling, supra, the Court noted the mere fact that an employee is required to eat lunch on the employer's premises and to be

in a duty status and subject to call during such period does not automatically make such period overtime, if the employee is otherwise relieved of performing substantial duties.

The plaintiff in the present case is entitled to pick three places within close proximity of his route at which he may spend his lunch period. If he wishes to go to another lunch place, he may obtain permission from management. The plaintiff however, asserts that he cannot adequately and comfortably pursue his meal as he is limited to only three places which he may go for lunch and is not free to go to wherever he pleases. Additionally, the plaintiff asserts that he actually remains on duty in that he remains responsible for the mail not yet delivered, is subject to occasional interruptions and may be disciplined if he deviates from his authorized lunch places or fails to properly secure items for which he is accountable.

As noted above, the fact that an employee is required to eat lunch on the employer's premises does not automatically make such period overtime. The fact that the plaintiff

is restricted to three places within close proximity of his route to which he may go for lunch does not automatically make such period overtime if the plaintiff can adequately and comfortably pursue interests of a private nature during his lunch time and is not required to perform substantial duties during such period.

Thus, the Court must determine whether or not the plaintiff can adequately and comfortably pursue pursuits of a private nature during his lunch time. This analysis will parallel the analysis of whether the plaintiff is actually free to pursue his private needs or pleasures or whether the time spent is predominantly under the control of the employer and for the employer's benefit.

The plaintiff asserts that because he remains responsible for certain items within his possession over the lunch period that he does not receive a bonafide meal period. In Bennett v. The United States, 194 Ct. Cl. 889 (1971) the Court found:

> Plaintiff's point out, however, that, apart and aside from any performance of physical duties during their half hour

lunch period, they were at no time free of their responsibilities. It is true, particularly in the case of the Captains and Enginemen, that during the entire eight and one half hour period at sea they bore continuous responsibility for the safety of the vessel, its crew, and its equipment. This fact alone, however, does not bring the overtime pay statute into operation. As was stated in Bowling v. United States, 181 Ct. Cl. 968 (1967) at page 980:

> It is settled that the mere fact that an employee is required to eat lunch on the employer's premises and to be in a duty status and subject to call during such period does not automatically make such period 'overtime'. The actual performance of substantial duties during such period is a prerequisite to recovery.

The Court finds that although the plaintiff remains responsible for the items in his possession, the plaintiff does not actually perform substantial duties during his lunch period. Pursuant to Post Office regulations [3] the plaintiff, according to his deposition, locks his bag in his automobile or in a relay box when he goes to lunch.

3. City delivery carriers duties and responsibilities, Methods Handbook, series M41 131.1 security of the mails .11 keep the mail in your possession or locked in a relay box or vehicle... .13 When leaving the route for lunch, lock undelivered registered and COD mail in designated relay box or vehicle in accordance with existing practices. Make a simple record of registered, COD, and other more than ordinary value items which are left. On return from

lunch, check to insure that no pieces are missing.

The plaintiff retains his mailbox key, COD money, and receipts upon his person.

Although the plaintiff asserts that no one relieves him of his duties during his lunch time, it is apparent that the postal service has provided that the plaintiff secure his accountable items in either an automobile or a post office relay box when he goes to lunch. Thus, the Post Office does provide the plaintiff with the opportunity to secure his accountable items. Additionally, the items which the plaintiff retains on his person, the plaintiff's key, COD money and receipts, do not require the performance of substantial duties or interfere with the free disposition of the plaintiff's lunch period.

The fact that plaintiff is responsible for the postal items in his pockets during his lunch period does not require the performance of any activity which could be characterized as substantial duties. The plaintiff is not required to accept or deliver mail while on his lunch break. Additionally, the plaintiff locks

his undelivered mail in his automobile before going to lunch.

The Deputy Administrator of the Wage and Hour Division of the Department of Labor in response to a question posed by counsel for the National Association of Letter Carriers concerning the compensability of letter carriers meal periods, stated such a theory "would extend the requirement of compensation to 24 hours of the day in the case of outside workers who are required to take their employers tools or materials home with them or who drive home in the company's vehicles, so as to have them available for going directly to the work site the following morning."

Accordingly, the Court finds that the plaintiff's continuing responsibility for the postal items is not of such a nature as to inhibit the plaintiff's ability to adequately and comfortably pursue interests of a private nature during his lunch time and also does not amount to any activity which could be characterized as substantial duties.

The plaintiff also asserts that he is occasionally interrupted during his lunch period

by individuals requesting information on postal matters or for receiving letters. As a consequence the plaintiff contends that he is entitled to recover compensation for the entire 30 minute lunch period because he occasionally accepts letters or provides information to individuals while on his lunch period. While the defendant asserts that no Postal Regulations impose a requirement upon the plaintiff that he submit to interruptions during his lunch period, the plaintiff relies upon the general policy of the Post Office urging that the deliverymen always be courteous and specifically point to sections of the City delivery carriers duties and responsibilities contained in the Methods Handbook, Series M-41.[4]

4. M-41 112.6 provides:

> .61. Do not engage in controversies with customers or other members of the public when on duty.
>
> .62. When requested, furnish customers with postal and other reasonable information, provide change of address cards and other postal forms.

In Bowling, supra, the Court held that "the actual performance of substantial duties during such period is a prerequisite to recovery."

The plaintiff in the present case merely alleges that he is occasionally interrupted in order to provide information or accept letters. Although the plaintiff attempts to rely upon the general post office policy that deliverymen always be courteous, no postal regulation requires the plaintiff to accept mail or provide answers to questions while on his lunch period.

In Clark v. Atlanta Newspapers, Inc., 366 F.Supp. 886 (N.D. Ga. 1973), the Court found that where a newspaper editor, though relieved of all duties, chose to remain at his desk during the coffee break and lunch hour to answer the phone the lunch period was held to be non-compensable under the FSLA because such time was not required by the employer. To the extent the plaintiff voluntarily expends time in answering questions or accepting mail on his lunch period, such time is not compensable.

The fact that defendant may be subject to discipline for failure to follow postal service procedures does not render the plaintiff's lunch time compensable. Plaintiff asserts that he may be disciplined for deviating from his approved lunch spots or for failing to secure

the mail before he goes to lunch. Plaintiff asserts that as he is subject to disciplinary action for reasons that continue during his lunch period, he is therefore entitled to be compensated for that time.

The plaintiff in his brief cites a number of instances in which members of the postal service were disciplined for deviating from their route or for failing to properly secure accountable items. The fact that the plaintiff may be disciplined for deviating from one of his three authorized lunch places in violation of Postal Service retulations does not make the plaintiff's meal period compensable. The Court has already determined that in light of the need for the security of the mail the Postal Service may properly limit the number of places where plaintiff may go for lunch as long as the plaintiff may adequately and comfortably pursue his lunch. Furthermore, failing to properly secure the mail before the plaintiff goes to lunch or while the plaintiff is at lunch does not make such time compensable.

Finally, the plaintiff may pursue interests

of a purely private nature while on his lunch break. The plaintiff may choose three places where he wishes to eat his lunch. He may choose a restaurant, his automobile, a park, or even his home if it is within a reasonable distance from his route. While on his lunch period it is apparent that the plaintiff may eat, read, watch TV, or even sleep if he so desired.

The Court finds that the plaintiff can adequately and comfortably pursue his lunch period. Additionally, the Court finds that the plaintiff may pursue interests of a purely private nature while on his lunch period. Thus, the plaintiff is not entitled to an extra half hour period overtime in light of the fact that he receives a bonafide meal period pursuant to the FLSA.

Accordingly, the plaintiff's motion for summary judgment is denied. The defendant's motion for summary judgment is granted as the Court finds as a matter of law that the plaintiff receives a bonafide meal period in compliance with the FLSA.

IT IS SO ORDERED.

David D. Dowd, Jr.
U. S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Kenneth J. Hill, et al.,	)	
	)	CASE NO. C80-2312
Plaintiffs,	)	
	)	
vs.	)	
	)	
United States Postal Service, et al.,	)	JUDGMENT ENTRY
	)	
Defendants.	)	

In light of the memorandum opinion filed contemporaneously herewith, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that summary judgment be granted in favor of the defendants and against the plaintiff Ernest R. Cummings. Although this entry deals with fewer than all the parties, the Court pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure enters final judgment as to Ernest R. Cummings as there is no just reason for delay.

David D. Dowd, Jr.
U. S. District Judge

FEDERAL EMPLOYEES PAY ACT

Excerpt from 5 U.S.C. Sec. 5544:

Wage-board overtime and Sunday rates; computation

(a) An employee whose pay is fixed and adjusted from time to time in accordance with prevailing rates under section 5343 or 5349 of this title, or by a wage board or similar administrative authority serving the same purpose, is entitled to overtime pay for overtime work in excess of 8 hours a day or 40 hours a week. However, an employee subject to this subsection who regularly is required to remain at or within the confines of his post of duty in excess of 8 hours a day in a standby or on-call status is entitled to overtime pay only for hours of duty, exclusive of eating and sleeping time, in excess of 40 a week. The overtime hourly rate of pay is computed as follows:...

FAIR LABOR STANDARDS ACT

Excerpt from 29 U.S.C. Sec. 203:

Definitions as used in this Act (29 U.S.C. 201-216, 217-219, 557)

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means--

(A) any individial employed by the Government of the United States--

* * *

(B) any individual employed by the United States Postal Service or the Postal Rate Commission; and...

FAIR LABOR STANDARDS ACT

Excerpt from 29 U.S.C. Sec. 207

Sec. 207 Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

FAIR LABOR STANDARDS ACT

Excerpt from 29 U.S.C. Sec. 216 Penalties - Civil and criminal liability - Enforcement procedure - Savings provision

* * *

(b) Any employer who violates the provisions of section 6 or section 7 of this Act [29 USCS 206 or 207] shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a

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reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 [29 USCS 217] in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act [29 USCS 206 or 207] by an employer liable therefor under the provisions of this subsection.

FAIR LABOR STANDARDS ACT

Excerpt from 29 U.S.C. Sec. 255

Sec. 255 Statute of limitations

* * *

(a) if the cause of action accrues on or after the date of the enactment of this Act [May 14, 1947]--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;...

POSTAL REORGANIZATION ACT

Excerpts from 39 U.S.C. Sec. 410

Sec. 410 Application of other laws.

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no federal law dealing with public or Federal contracts, property, works, officers, employees, budgets or funds, including the provisions of Chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

CODE OF FEDERAL REGULATIONS

29 C.F.R. Sec. 785.19

Labor - Chapter V, Wage and Hour Division

785.19 Meal

(a) Bona fide meal periods. Bona fide meal periods are not worktime. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods. The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating. (Culkin v. Glenn L. Martin, Nebraska Co., 97 F. Supp. 661 (D. Neb. 1951), aff'd 197 F. 2d 981 (C.A. 8, 1952), cert. denied 344 U.S. 888 (1952); Thompson v. Stock & Sons, Inc., 93 F. Supp. 213 (E.D. Mich 1950), aff'd 194 F. 2d 493 (C.A. 6, 1952); Biggs v. Joshua

Hendy Corp., 183 F. 2d 515 (C.A. 9, 1950), 187 F. 2d 447 (C.A. 9, 1951); Walling v. Dunbar Transfer & Storage Co., 3 W.H. Cases 284; 7 Labor Cases para.61.565 (W.D. Tenn. 1943); Lofton v. Seneca Coal and Coke Co., 2 W.H. Cases 669; 6 Labor Cases para.61,271 (N.D. Okla. 1942); aff'd 136 F. 2d 359 (C.A. 10, 1943); cert. denied 320 U.S. 772 (1943); Mitchell v. Tampa Cigar Co., 36 Labor Cases para. 65, 198, 14 W.H. Cases 38 (S.D. Fla. 1959); Douglass v. Hurwitz Co., 145 F. Supp. 29, 13 W.H. Cases (E.D. Pa. 1956))

(b) Where no permission to leave premises. It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

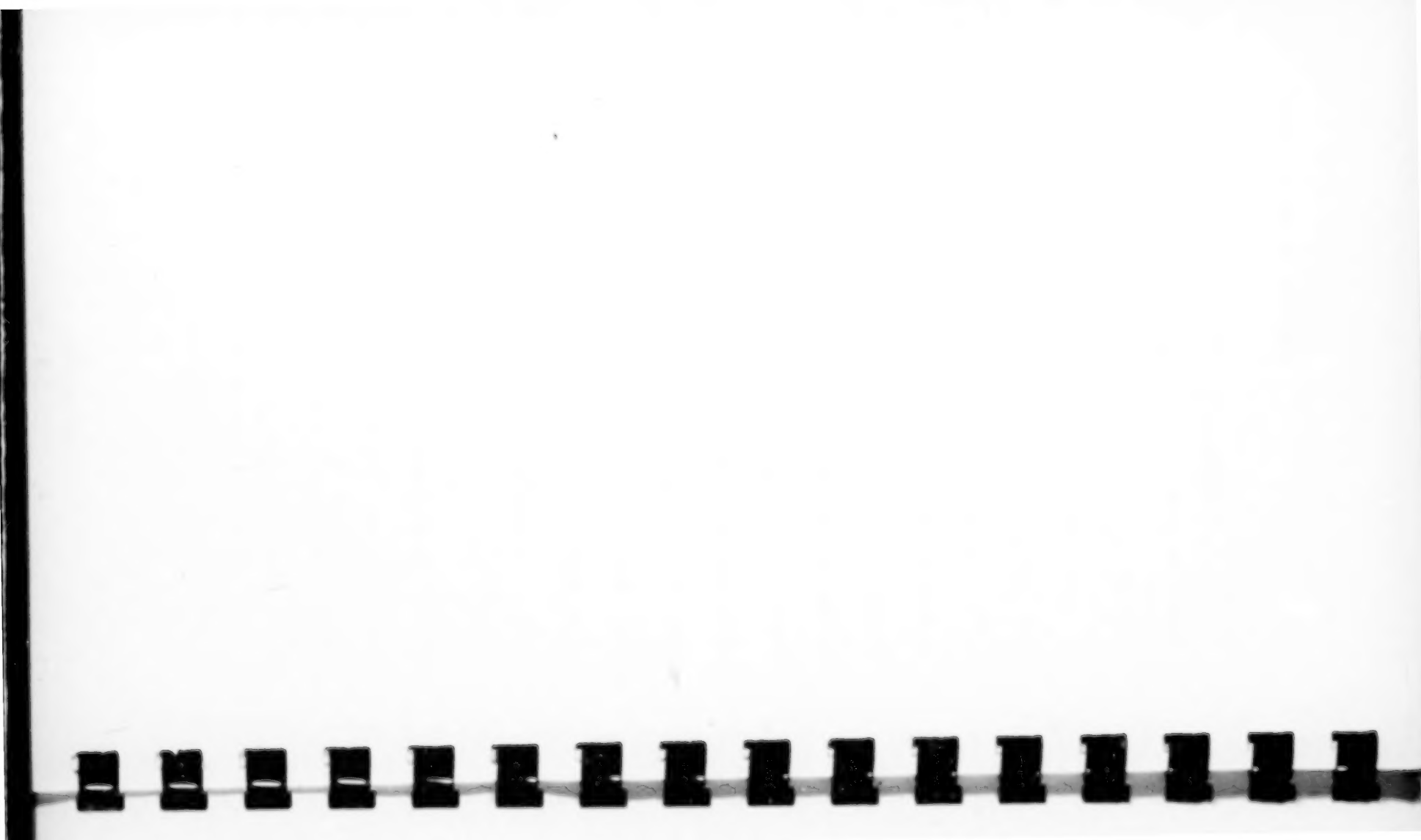
CODE OF FEDERAL REGULATIONS

29 C.F.R. Sec. 785.21

Labor - Chapter V, Wage and Hour Division

785.21 Less than 24-hour duty.

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime. (Central Mo. Telephone Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948); Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn. 1943); Whitsitt v. Enid Ice & Fuel Co., 2 W.H. Cases 584; 6 Labor Cases para. 61,226 (W.D. Okla. 1942).)



CODE OF FEDERAL REGULATIONS

Excerpt from 29 C.F.R., Sec. 785.22

Labor - Chapter V, Wage and Hour Division

785.22 Duty of 24 hours or more

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked,... Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked. (Armour v. Wantock, 323 U.S. 126 (1944); Skidmore v. Swift, 323 U.S. 134 (1944); General Electric Co. v. Porter, 208 F. 2d 805 (C.A. 9, 1953), cert. denied, 347 U.S. 951, 975 (1954); Bowers v. Remington Rand, 64 F. Supp. 620 (S.D. Ill, 1946), aff'd 159 F. 2d 114 (C.A. 7, 1946) cert. denied 330 U.S. 843 (1947); Bell v. Porter, 159 F. 2d 117 (C.A. 7, 1946) cert. denied 330 U.S. 813 (1947); Bridgeman v. Ford, Bacon & Davis, 161 F. 2d 962 (C.A. 8, 1947); Rokey v. Day & Zimmerman, 157 F. 2d 736 (C.A. 8, 1946); McLaughlin v. Todd &

Brown, Inc., 7 W.H. Cases 1014; 15 Labor Cases para. 64,606 (N.D. Ind. 1948); Campbell v. Jones & Laughlin, 70 F. Supp 996 (W.D. Pa. 1947).)

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No. 84-1666

In the Supreme Court of the United States

OCTOBER TERM, 1985

ERNEST R. CUMMINGS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, requires that a Postal Service letter carrier be paid for his lunch period.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 751 F.2d 810. The opinion of the district court (Pet. App. 23a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1984. A petition for rehearing was denied on January 22, 1985 (Pet. App. 20a-22a). The petition for a writ of certiorari was filed on April 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a United States Postal Service letter carrier, claims that the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, entitles him to wages for his lunch period.[1]

1. Petitioner is employed by the Postal Service as a letter carrier at the North Olmsted Post Office near Cleveland, Ohio (Pet. App. 3a). Petitioner arrives each morning at the post office in full uniform. His day begins with "office time," during which he prepares mail for delivery and signs out accountable items including a Postal Service key, and accountable mail, such as COD, postage due, registered, certified, and insured mail. He then proceeds to "street time," during which he delivers and accepts mail, and collects receipts and money for certain mail (*ibid.*).

Petitioner receives a one-half hour lunch break between 12:45 and 1:15 p.m. He has a choice of three lunch places selected by him and approved by his supervisors. His lunch period begins when he secures undelivered mail in the trunk of his vehicle and drives from his delivery route to an authorized lunch place by an authorized line of travel. The Postal Service does not pay petitioner during the one-half hour lunch period. Thus, petitioner clocks an eight and one-half hour work day but is paid for eight hours (Pet. App. 3a).

Petitioner remains responsible for the security of mail (including customs duty mail, postage due mail, COD mail, and special services mail) during lunch. However, this

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[1]This suit was brought initially by eight present and former postal employees, including petitioner. Approximately 12,000 postal employees consented to become plaintiffs pursuant to Section 16(b) of the Act, 29 U.S.C. 216(b) (Pet. App. 1a). The district court, upon agreement with the parties, considered only the petitioner's claim, treating it as typical of all plaintiffs' claims (*id.* at 2a).

responsibility is discharged by properly securing the mail prior to the lunch period. In addition, petitioner is responsible for, and carries to lunch, the following items:

(1) a list of the accountable mail that has not been delivered prior to lunch;

(2) receipts for the accountable mail that has been delivered prior to lunch; and

(3) money he may have collected from deliveries of COD mail prior to lunch.

Pet. App. 4a-5a. Petitioner is also responsible for his Postal Service key.

Postal regulations require letter carriers to be "courteous and obliging in the performance of duties," to furnish customers with postal information and postal forms, and to accept prepaid first-class mail from customers (Pet. App. 5a). In addition, letter carriers are subject to discipline for failure to secure mail in postal vehicles and relay boxes prior to lunch and for failure to exercise reasonable care for the items in their possession. On the other hand, city letter carriers are not required to accept mail from the public or otherwise conduct postal business during their meal periods and are not required to eat in their postal vehicle or to keep the vehicle in sight during lunch (*id.* at 5a-7a).

2. Petitioner brought suit in the United States District Court for the Northern District of Ohio, claiming that Section 7(a) of the FLSA, 29 U.S.C. 207(a), required the Postal Service to pay him for his lunch period.[2] The district

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[2]Section 7(a)(1), 29 U.S.C. 207(a)(1), requires employers to pay employees one and one-half times the normal hourly wage for hours worked beyond a 40-hour week. It provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is

court rejected this claim, holding that Section 7(a) does not require compensation because the restrictions on petitioner's lunch period do not interfere with the free disposition of his time. It found that petitioner had no substantial duties during lunch that would limit his private pursuits. The court concluded that the Postal Service therefore was not obligated to pay petitioner for his meal period (Pet. App. 38a, 42a).

The court of appeals affirmed (Pet. App. 1a-19a). The court agreed that petitioner's meal period was not compensable because he was not required to perform any substantial work activities during that time (*id.* at 13a).

ARGUMENT

The court of appeals correctly applied settled precedent to the facts of this case. Its judgment is consistent with the decisions of this Court and does not create a conflict with other courts of appeals. This Court's review is therefore unwarranted.

1. Contrary to petitioner's contentions (Pet. 13-29), the court of appeals correctly applied the decisions of this Court interpreting Section 7(a) of the FLSA. This Court has indicated that employees covered by Section 7(a) must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590,

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employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Postal Service employees fall within the protection of this provision. See § 3(e)(2)(B), 29 U.S.C. 203(e)(2)(B).

598 (1944) (footnote omitted); see also *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945). And the Court has ruled that Section 7(a) reaches occupation in a waiting or stand-by capacity "for the employer's benefit." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); accord *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-137 (1944). But the Court has never held that Section 7(a) requires compensation for all hours within the work day. Instead, the Court has stated that each case "must stand on its own facts." *Skidmore* v. *Swift & Co.*, 323 U.S. at 140. "Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Id.* at 137.

Thus, the Court has recognized that Section 7(a) generally does not require compensation for eating and sleeping periods. In *Armour & Co.* v. *Wantock, supra*, the Court affirmed a judgment that company firefighters were entitled to compensation for time spent in a stand-by capacity except that "[u]sual hours for sleep and for eating * * * would not be counted * * *." 323 U.S. at 129. The Court identified the critical factor as "[w]hether time is spent predominantly for the employer's benefit or for the employee's * * *." *Id.* at 133. In *Skidmore* v. *Swift & Co., supra*, involving similar facts, the Court again declined to hold that Section 7(a) requires compensation for all standby time, relying on an administrative determination that eating and sleeping—

> are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances.

323 U.S. at 139.

These cases fully support the court of appeals' conclusion that Section 7(a) does not require compensation for petitioner's lunch period.[3] The court below carefully analyzed the responsibilities of the mail carrier during his lunch period and determined that the carrier is able to pursue his mealtime adequately and comfortably, is not engaged in the performance of substantial duties, and does not spend the time predominantly for the employer's benefit.[4] There is no reason for further review of this essentially fact-bound ruling. See *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985), slip op. 8.[5]

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[3]The court of appeals' conclusion is also supported by the Department of Labor's interpretation of its regulations, see 29 C.F.R. 785.19, defining a bona fide meal period. See Pet. App. 11a-12a, 13a-15a. The Department's interpretation is set forth in an opinion letter from the Deputy Administrator of the Wage and Hour Division of the Department of Labor in response to an inquiry from the National Association of Letter Carriers (*id.* at 13a-15a). As the court below recognized, "the opinion letter is entitled to some credence" (*id.* at 15a). See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. at 139-140.

[4]As the court of appeals noted (Pet. App. 15a), the fact that petitioner is responsible for mail secured in his vehicle during his meal period does not mean that this time is not his own. Nor does the limited selection of three authorized lunch places require compensation (*id.* at 15a-16a). Furthermore, petitioner's responsibility for those accountable items and receipts that he must carry with him during meals is not a substantial activity that interferes with his lunch period to the extent that Section 7(a) would require compensation (Pet. App. 16a). Finally, petitioner failed to show that he is subject to frequent or even occasional interruptions during his meals (*ibid.*). Such interruptions, in any event, would be considered a de minimis interference with his lunch time (*id.* at 17a-18a). See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

[5]Petitioner's contention (Pet. 23-24) that the court below abandoned its own precedent is also without merit. Petitioner relies on *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F.2d 493 (6th Cir. 1952), in which the court held that lunch periods at a flour mill were compensable because the employees were required to eat while tending continuously operating machinery. The trial judge noted that "a man who has to oil

2. Petitioner contends (Pet. 29-35) that the court of appeals departed from the standards of the FLSA by relying on cases decided under provisions the Federal Employees Pay Act (FEPA), 5 U.S.C. 5544. However, as petitioner admits (Pet. 30), the court of appeals itself placed no reliance on FEPA cases; it merely rejected petitioner's challenge to the district court's reliance on FEPA precedent (Pet. App. 15a). Thus, the court of appeals' purported reliance on FEPA cases is, in fact, non-existent and provides no ground for this Court's review.

In all events, the district court's reliance on FEPA precedent was clearly proper in the present case. The FEPA, like the FLSA, requires overtime pay for work beyond a specified number of hours. See 5 U.S.C. 5544. In deciding whether meal or sleep periods constitute work under the FEPA, the Court of Claims originally looked to FLSA precedent for guidance. See *Armstrong* v. *United States*, 144 Ct. Cl. 659, 660-662, cert. denied, 361 U.S. 825 (1959) (relying on *Armour & Co.* v. *Wantock, supra*, and *Skidmore* v. *Swift & Co., supra*). It consistently applied the resulting principles to FEPA cases. See, *e.g.*, *Baker* v. *United States*, 218 Ct. Cl. 602, 619-621 (1978); *Bennett* v. *United States*, 194 Ct. Cl. 889, 902-903 (1971); *Bowling* v. *United States*, 181 Ct. Cl. 968, 980 (1967). Thus, the Court of Claims' FEPA precedents reflect this Court's rulings under the FLSA.[6]

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machinery with a sandwich in his hand is not having a free lunch period." 194 F.2d at 496. Thus, the facts in *F. W. Stock & Sons* differed markedly from those in the instant case.

[6]Petitioner is incorrect in suggesting (Pet. 33) that *Beebe* v. *United States*, 640 F.2d 1283 (Ct. Cl. 1981), renders FEPA precedent inapplicable to FLSA claims. That case holds that federal firefighters' meal periods are compensable under Section 7(k) of the FLSA, 29 U.S.C. 207(k). The instant case involves postal workers covered under Section 7(a). See pages 3-4 note 2, *supra*. Petitioner neglects to mention that "the overtime pay provisions of the FLSA applicable to federal firefighters differ significantly from the FLSA overtime pay provisions for

3. Finally, petitioner asserts (Pet. 36-40) that the court of appeals deprived him of the same application of the FLSA afforded employees in the private sector. This argument is based upon a mischaracterization of the court of appeals' decision. Petitioner claims that "[a]fter finding that petitioner is engaged in work throughout his lunch period, [the court], nonetheless, held that he was not entitled to compensation" and thereby applied a "new standard" to this case (Pet. 36-37). In fact, the court below carefully analyzed petitioner's responsibilities during his lunch period, found that he did not engage in the performance of any substantial duties, and therefore concluded that he did not "work" within the meaning of the FLSA (Pet. App. 15a-17a). The court thus applied established FLSA precedent to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ANTHONY J. STEINMEYER
SANDRA WIEN SIMON
Attorneys

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most other federal employees." *Beebe*, 640 F.2d at 1286. Indeed, federal regulations specify that firefighters' meal periods should generally be treated as compensable hours of work. 29 C.F.R. 553.15. See *Beebe*, 640 F.2d at 1289-1290. Thus, *Beebe* does not support the broad position that petitioner suggests and is quite irrelevant to the subsection of the FLSA involved in this case.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

ERNEST R. CUMMINGS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER ERNEST R. CUMMINGS

GABRIELLE GULYASSY KINKELA*
VICTOR J. GULYASSY
ROBERT V. KINKELA
GULYASSY, KINKELA & KINKELA
6461 Pearl Road, Suite One
Parma Heights, Ohio 44130
216-842-1313
Counsel for Petitioner,
Ernest R. Cummings

BEST AVAILABLE COPY

*Counsel of Record

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INTRODUCTION

Respondents urge this Court to permit a decision to stand that would absolve the Postal Service of its statutory obligation to compensate letter carriers for time worked during meal periods.

If such an unjust result were to be allowed, this Court's construction of the Fair Labor Standards Act would be uprooted, creating inestimable upheaval. The decision of the Sixth Circuit Court of Appeals negates the concept of work time even as understood in the common human experience. It would generate endless disputes, with no reasonable hope of resolution. It would allow employers to claim all of an employee's time while compensating him for only part of it. Such employment practices have long been repugnant to Congress and to this Court.

I. LUNCH PERIOD TIME THAT IS DIRECTED AND CONTROLLED BY THE POSTAL SERVICE FOR ITS BENEFIT IS COMPENSABLE UNDER THE FAIR LABOR STANDARDS ACT.

Respondents contend there is no reason for further review of this essentially fact-bound case. (Resp. 6.) By characterizing this as a fact-bound case, respondents have gone to the center of petitioner's cause. Had the Sixth Circuit's decision been truly bound to determinative facts, and had those facts been construed in accord with applicable law, petitioner's claim would have been granted.

The elements of work time have been definitively established by this Court. Tennessee Coal Co. v. Muscoda Local, 321 U.S. 590, 64 S.Ct. 698, 88 L.Ed. 949 (1944), Armour & Co. v. Wantock, 323 U.S. 126, 65 S Ct. 165, 89 L.Ed. 118 (1944), Skidmore v. Swift & Co., 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). They are extraordinarily visible in the facts of this case.

Petitioner's lunch period begins when he enters his vehicle, after making his last pre lunch delivery. From that moment, and for each other moment of the lunch period, the Postal Service exercises its direction and control over petitioner, for its benefit.

Upon entering his vehicle, at the commencement of his lunch period, petitioner is under orders to follow lines of travel dictated by the Postal Service. He must follow these lines of travel to a place authorized by the Postal Service, and is under orders forbidding him from going elsewhere. He is not permitted to select his lunch place. He is only allowed to submit suggestions. The Postal Service must then give its authorization, and reserves the right to reject any suggestion that is not in keeping with its needs.

At the time his lunch period commences, and continuing for the entire meal period,

petitioner has with him all accountable items, and all undelivered United States mail entrusted to his care. He is under orders requiring him to remain responsible and accountable for mail security, because he is not relieved of these obligations until he makes an accounting to the Postal Service at the end of his work day.

After eating, petitioner must reach his next point of delivery by the time set as the conclusion of his lunch period. During this last portion of his meal period, petitioner is under orders to arrive at that point by following lines of travel dictated by the Postal Service.

Throughout his meal period, petitioner is subject to supervision. This is to insure that orders are being obeyed. In this way, the Postal Service insures there is no interruption in its direction and control over petitioner. Its overriding need to protect the sanctity and security of the mail requires

petitioner's immediate availability at any given moment he is on duty, including his lunch period. Throughout this time, petitioner also remains under orders to provide courteous service to the public, as requested.

Thus, during every moment of petitioner's lunch period, he is under Postal Service orders, has continuing responsibility and accountability for mail security, is liable to be called upon at any moment, and is not at liberty to go away. Armour and Co. v. Wantock, supra.

Respondents contend that the Sixth Circuit's decision is fully supported by Tennessee Coal Co. v. Muscoda Local, Armour and Co. v. Wantock and Skidmore v. Swift & Co., supra, and by the Code of Federal Regulations.

This argument is untenable, because the decision of the court below was not in reliance on FLSA standards, but on a substantial duties standard. As petitioner has previously shown, (Pet. 14-17 and 30-32), substantial duties means the performance

of physical labor.

Under the FLSA, compensation has never been contingent upon the performance of physical labor. Tennessee Coal, and its progeny, unequivocally repudiate such a requirement. Hours worked are not limited to time spent in active labor, but include time given by the employee to the employer. Armour & Co. v. Wantock and Skidmore v. Swift & Co., supra.

Beginning with Tennessee Coal, and with additional clarification thereafter, in Armour and Skidmore, this Court identified the employer's control and requirements as determinative elements of work time. Fundamental to the concept of direction and control, is the resulting restrictive effect on the employees' free disposition of time as they see fit. It was in reliance on these FLSA principles that the Sixth Circuit Court of Appeals decided F. W. Stock & Sons v. Thompson, 194 F.2d 493 (1952). The standard, enunciated so clearly therein, is that a meal

period is compensable, unless it is free time, during which the employee is free to serve his own interests and do as he pleases.

In deciding petitioner's claim, the Sixth Circuit abandoned that standard, together with this Court's precedent upon which it has previously relied.

Respondents have demonstrated they do not understand the FLSA by arguing that this Court has recognized that Section 7(a) generally does not require compensation for eating and sleeping periods. First, 29 U.S.C. 207(a) does not set a standard for determining work time, but provides for computation of overtime on the basis of a forty hour work week. The method of computing overtime is not at issue. Second, this Court has not established a general rule excluding meal periods from compensable time, as respondents erroneously allege.

Armour and Skidmore stand for the proposition that inactive duty may be duty

nonetheless where the employees are under orders, liable to be called upon at any moment, and not at liberty to go away. Hours worked are not limited to time spent in active duty, but include time given by the employee to the employer. In Armour, meal time was not at issue. In Skidmore, there was an arrangement between the employer and the employees, and the employees were on duty 24 hours or more. Under those particular circumstances, meal and sleep periods may be excluded.

The above decisions are codified at 29 C.F.R. 785.22 which requires compensation for meal and sleep time of employees who are on duty 24 hours or more, unless there is a contrary arrangement to which the employee has agreed. Where there is an agreement, no more than 8 hours may be excluded.

Where employees are on duty less than 24 hours, 29 C.F.R. 785.19 requires compensation for meal periods unless the employee is completely relieved from duty, whether

active or inactive. This is a codification of judicial construction of the Act, including F.W. Stock & Sons v. Thompson, supra, which, in turn, was decided in reliance on Armour and Skidmore. Additionally, employees on duty less than 24 hours are working, even though permitted to sleep or engage in other personal activities when not busy. 29 C.F.R. 785.21.

Thus, both this Court, and the Regulations iterating the inactive duty standard, flatly contradict respondents' claim of a general rule excluding meal periods from compensable time.

This Court has cautioned that words of its opinions are to be read in light of the facts of the case. Armour & Co. v. Wantock, supra. Respondents have disregarded these instructions by attempting to superimpose an exclusion, permissible only under the specific 24 hour duty circumstances present in Skidmore, on the facts of this case.

However, petitioner is on duty 8-1/2 hours, not 24 hours. His meal period cannot be

excluded from compensable time, because he is not relieved of duty,but continues to serve his employer's interests.

Respondents also refer to a writing by the Department of Labor, portions of which are included in the opinion of the court below. (Pet.App. 13a-15a.) Respondents characterize it as the DOL's interpretation of its Regulations. This is an erroneous representation.

The DOL's duties are not to be confused with the authority of the courts to interpret the Act by reaching conclusions of law, based on findings of fact. Skidmore v. Swift & Co., supra. The DOL codifies said pronouncements of this Court at 29 C.F.R. 785.2, which states that ultimate decisions on interpretations of the Act are made by the courts. Thus, the administrator may only determine the position he will take if the courts have not already spoken.

The regulations set forth in the

preceding paragraphs summarize relevant FLSA standards that are the result of judicial construction. Once that has been accomplished, the interpretation has been made for the DOL, and its duty is to enforce compliance.

This case does not present any unsettled questions of law. The official position of the DOL must necessarily be that which the courts have already established. This means lunch periods are compensable under the FLSA unless the employee is completely relieved of duty, whether active or inactive. 29 C.F.R. 785.19. The law does not say partially, or substantially relieved of duty, but completely. Likewise, to insure there is no confusion, inactive duty is specifically identified. That does not, and cannot, give rise to the "substantial duties" standard relied on by the court below.

Where the words and their meaning are as clear and unambiguous as they are in 29 C.F.R.

785.19, there is no cause for further interpretation, and no excuse for conjecture.

As petitioner has already demonstrated (Pet. 26, 27), to the extent that any DOL utterances are inconsistent with 29 C.F.R. 785.19, or are conjectural, they are not entitled to any credence whatsoever. Skidmore v. Swift & Co., supra, and Jewell Ridge Coal Corp. v. Local, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1945).

Nevertheless, the court below included such conjecture in its opinion. By the Sixth Circuit's own admission, the DOL writing it quoted is of less than marginal import. It was a response to a one-sentence inquiry. Curiously, and uncharacteristically, the DOL ventured a reply in a vacuum. Instead of adhering to judicial construction, as it was obligated to do, the DOL resorted to conjecture.

Other events, that were transpiring about the same time as the DOL evidenced its above

confusion, provide some insight. The DOL usually demonstrates single-mindedness in enforcing the FLSA. At least it does so with private sector employees. However, it has ambivalent feelings where another federal agency is involved, because it perceives itself as wearing "two hats." Donovan v. United States Postal Service, 530 F.Supp. 894 (D.C.D.C. 1981). Where the Postal Service is involved, the DOL feels responsible to the agency, not just to its employees. Under such circumstances, the DOL experiences conflicts that interfere with its usual steady course. Donovan v. United States Postal Service, supra.

II. THE FAIR LABOR STANDARDS ACT REQUIRES COMPENSATION FOR LUNCH PERIODS DURING WHICH PETITIONER IS SUBJECT TO DISCIPLINARY ACTION FOR FAILURE TO OBEY POSTAL SERVICE ORDERS REGULATING THOSE EMPLOYMENT OBLIGATIONS WHICH CONTINUE THROUGHOUT HIS MEAL PERIOD.

Respondents admit that petitioner is subject to discipline for failure to secure mail in postal vehicles and relay boxes prior to

lunch and for failure to exercise reasonable care for the items in his possession. (Resp.3.) This admission is preceded by two conflicting statements. On the one hand, respondents assert petitioner is responsible for the security of mail during lunch. (Resp. 2.) On the other hand, they allege this responsibility is discharged prior to lunch. (Resp. 3.)

The fact is petitioner cannot discharge these obligations prior to lunch, because the mail and all accountable items stay with him, in his vehicle and on his person. It is for this reason the Postal Service holds petitioner responsible and accountable, under penalty of disciplinary action, until it relieves him of these obligations at the end of his work day.

Respondents omit mentioning that petitioner is also subject to disciplinary action if he does not obey orders requiring him to remain immediately available to the Postal

Service throughout the meal period. This means he must follow authorized lines of travel, and must remain confined at an authorized place.

Respondents also carefully avoid any reference to the fact that if the Postal Service did not continue to make use of petitioner's services, for its benefit, during the meal period, there would be no need to utilize discipline to insure that Postal Service requirements were being satisfied in compliance with its dictates. In turn, discovery of infractions of the multiple Postal Service orders petitioner is compelled to obey throughout his meal period, could not be accomplished unless he remains subject to supervision during that time. (Pet. 10-12) Most significantly, respondents have failed to reconcile these circumstances with the freedom from employment obligations which the FLSA requires during uncompensated meal periods.

This Court has long recognized that disciplinary action is inherent to the element of control. Jewell Ridge Coal Corp. v. Local, supra. Indeed, it is impossible to conceive of any circumstance that would be more compelling proof of work time. Petitioner cannot be subject to disciplinary action during meal periods,for failure to obey orders regulating employment obligations that continue throughout that time, without it being recognized as compensable work time.

To paraphrase the Court in F. W. Stock & Sons v. Thompson, supra, a letter carrier who has to eat lunch while continuing to be held responsible and accountable for the security of United States mail, under threat of disciplinary action, is not having a free lunch period. A letter carrier who is under orders, during lunch, requiring him to be immediately available to the Postal Service, under threat of disciplinary action, is not free to do as he pleases.

III. 39 U.S.C. SECTION 410(a) SPECIFICALLY EXCLUDED THE POSTAL SERVICE FROM THE FEDERAL EMPLOYEES PAY ACT.

Respondents argue that reliance on Federal Employees Pay Act precedent was clearly proper in the present case. (Resp. 7)

However, no argument can overcome twice told intent of Congress. The Postal Reorganization Act of 1970 specifically excluded the Postal Service from the Federal Employees Pay Act. 39 U.S.C. Section 410(a). The 1974 amentments to the FLSA specifically include the Postal Service. 29 U.S.C. Section 203 (e)(2)(B). Congress could not have spoken in any clearer terms.

Therefore, the Pay Act has no applicability to petitioner. It has been superseded by the FLSA, even as to those employees to whom it once applied. The court of claims duly acknowledged the demise of the Pay Act, and the standards that went with it, in Beebe v. United States, 640 F.2d 1283 (Ct.Cl. 1981) It cannot

be resurrected for this or any other FLSA claim.

Additionally, the Pay Act's substantial duties standard, requiring the performance of physical labor, has never been a prerequisite to recovery under the FLSA.

The Pay Act has long been set to rest. It was disposed of accordingly in the Petition (28-35), and requires no further comment.

CONCLUSION

Respondents' arguments have not diminished the magnitude of the error at issue.

The decision of the Sixth Circuit Court of Appeals defeats the entire pattern and purpose of the Fair Labor Standards Act. It would create extraordinarily vexatious problems in an area of the law that is too well settled to countenance such a grievous disruption.

Therefore, petitioner respectfully requests this Court to preserve the uniform construction and application of the Fair Labor Standards Act by granting certiorari.

Respectfully submitted,

GABRIELLE GULYASSY KINKELA*
VICTOR J. GULYASSY
ROBERT V. KINKELA
GULYASSY, KINKELA & KINKELA
6461 Pearl Road, Suite One
Parma Heights, Ohio 44130
216-842-1313
Counsel for Petitioner,
Ernest R. Cummings

*Counsel of Record
Dated: August 26, 1985